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IN THE

Supreme Court of the United States

October Term, 1946

No. 1239

S. L. HURT,

Petitioner,

versus

COTTON STATES FERTILIZER COMPANY *et al.*,

Respondents,

(District Court No. 301)

S. L. HURT,

Petitioner,

versus

COTTON STATES FERTILIZER COMPANY *et al.*,

Respondents.

(District Court No. 316)

S. L. HURT *et al.*,

Petitioner,

versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et al.*,

Respondents.

(District Court No. 324)

REPLY BRIEF FOR PETITIONER

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Statement

This Court does not sit, in diversity jurisdiction cases, as a court of first instance to decide questions of State

law that ought to have been decided below.[1] Under that rule, and upon careful study of the Responses herein, we think that this is a case in which certiorari should be granted and reversal and remand ordered upon the present submission, without further argument.

We address ourselves to that proposition herein.

I. As to Nos. 301 and 316

The respondents make two contentions in opposition to the petition: *first*, that the questions presented are contrary to the District Court's Findings (Response, pp. 2-12); *second*, that the courts below did decide the issues with reference to Georgia law (Response, pp. 12-20).

The first argument begs the question. Where the courts below have applied the wrong rule of decision, it is irrelevant to argue in this Court that they reached the right result. "While respondent contends that the decision below is not in conflict with local law, it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court."[2]

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[1] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Company* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 497; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

[2] *Rosenthal* v. *New York L. Ins. Co.*, 304 U. S. 263, 264. Were the rule otherwise, the respondents' first argument would still be bad. The respondents do not controvert any of the facts set out at pp. 8-15 of the petition regarding the transactions in suit. Thus, for example, they concede *sub silentio* the secret diversion of corporate property to Clay and Thompson in the Howell transaction, and the secret appropriation of corporate property by Clay and O'Shaughnessey in the Thompson transaction. The respondents merely quote from the District Court's Findings as though that were the end of the matter; but these Findings are defective on their face, in that the District Court ignored the very features of the transactions which constituted the fraud in them. Pp. 2-12 of the

The respondents' second argument will not bear analysis either:

(a) The respondents would have it supposed that the District Court must have decided the issues with reference to Georgia law, because the Conclusions of Law were couched in the language of two sections of the Georgia Code. But the same language might just as well have been culled from any number of elementary texts on these subjects, and from Federal as well as State sources. For example, Conclusion of Law No. 4 in No. 316 reads (R. 2054, v. IV): "The plaintiff was not a shareholder in Cotton States Fertilizer Company at the time of the transaction of which he complains, nor did his shares thereafter devolve on him by operation of law." It would be the merest guess to attempt to say whether this comes from §22-711 of the Georgia Code (see Appendix to petition, p. 33), or Rule 23(b) (1) of the Federal Rules of Civil Procedure, or any general text. The words used show nothing as to the thinking that underlay them. The District Court could perfectly well have worded its Conclusions as it did before *Erie* v. *Tompkins* had been decided, when it was commonly supposed that "this question of a director's dealing with his corporation is one of general law."[3]

Response only emphasize the fact that the omissions noted, and the criticisms made, at p. 30 of the petition are exactly in accordance with the Record. Accordingly, neither the rule that the findings of the District Judge must stand unless clearly erroneous, nor the two-court rule, would be a bar to review by this Court, even if the correct rule of decision had been applied below. The case would then be one where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions" (cf. *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202, 206), a proposition which the petition demonstrates and the Response does not meet.

[3] *Ransome Concrete Machinery Co.* v. *Moody*, 282 Fed. 29, 34 (2d C. C. A., 1922).

(b) The ultimate error below is apparent from one sentence at page 13 of the Response, where we read: "The 'substantive local law' is found in Georgia statutes"—and thereafter, whenever in the Response "substantive local law" is spoken of, it is spoken of as synonymous and co-extensive with §§22-710 and 22-711 of the Georgia Code. This occurs not less than five times in this part of the argument. Nowhere in the Response is any consideration given to the abundant body of Georgia case law, cited in the petition, which lays down the fundamentals of fiduciaries' obligations and interprets the pertinent Code provisions on the subject; and nowhere is any attempt made to reconcile with the stern integrity of that law, the approval given below to the respondents' transactions of self-enrichment. Looking to the State statute alone, without full consideration of the decisions which construe it, has been expressly condemned by this Court as non-compliance with the duty of Federal courts in diversity jurisdiction cases "to ascertain and apply the State law, where, as in this case, it controls decision."[4]

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[4] *Huddleston* v. *Dwyer, supra,* 322 U. S. at p. 236. In *Ruhlin* v. *New York L. Ins. Co., supra,* this Court said (304 U. S. at p. 209): "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law." If State law is not definitely settled, it must be searched far enough to determine what it probably will be when the highest court of the State does speak upon it (*West* v. *American Telephone & Telegraph Company,* 311 U. S. 223). A holding that mere gestures of deference to State law, such as the respondents suggest in this case, suffice, would as effectively "thwart the purpose of the jurisdictional act" as would a refusal to consider State law at all. Cf. *Meredith* v. *Winter Haven,* 320 U. S, 228, 234-5.

(c) As regards the opinion of the Circuit Court of Appeals, the Response shows that certain Georgia cases set out at pages 16-20 "were cited to the Circuit Court of Appeals at pages 194-198 of our brief there." However, the question is not what authorities the parties cited, but what rule of decision the Court applied. In *Klaxon Company* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 496, this Court reversed and remanded because the Circuit Court of Appeals' decision "apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed."[5] Similarly, there was modification and remand in *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169, because this Court could not determine from the proceedings below whether the holding of invalidity of the ordinance there in question "results from the provisions of a state statute, or from the constitution of the state, or from the 14th Amendment."

(d) At page 15 of the Response it is stated, with typographical emphasis, that none of the Georgia cases cited by the petitioner in Nos. 301 and 316 "was cited to the Circuit Court of Appeals by the petitioner when he was the appellant in the Court below." Apparently the respondents offer this as justification for the Court's failure, so plainly reflected in its opinion, to refer to Georgia law for decision of the issues. However, the obligation of federal courts in diversity jurisdiction cases to follow the substantive law of the States is not conditioned upon the industry of counsel or the fruitfulness of its results. This Court has repeatedly made it plain that not only the parties, but, as well, "the federal courts must now search

[5] The court further said (p. 497): "Looking then to the Delaware cases, petitioner relies on one group to support his contention * * * and respondent on another to prove the contrary. We make no analysis of these Delaware decisions, but leave this for the Circuit Court of Appeals when the case is remanded."

for and apply the entire body of substantive law governing an identical action in the state courts";[6] and this "is the duty of the federal appellate courts, as well as the trial court."[7]

II. As to No. 324

What we have said regarding the Response in Nos. 301 and 316 is entirely applicable, *mutatis mutandis*, to No. 324. The Circuit Court of Appeals did, to be sure, cite Georgia law for collateral and procedural features of this case (footnotes 13 and 14, R. 2600-01, vol. V), but it cited no authority whatever for the substantive issue therein, viz., the validity of the agreement. This last the Circuit Court of Appeals disposed of in one sentence: "As to Mrs. Hurt's claim against the estate, we think it quite clear that the record supports the finding of the district judge that she had a substantial claim against the estate which is valid and unpaid for an amount considerably in excess of the present value of the certificate in controversy." Yet the breadth as well as the strictness of the Georgia rule is not in dispute: at page 14 of the Response it is conceded that under Georgia law "it is true that a contract between husband and wife made with the intention of promoting a dissolution of the marriage relation is contrary to public policy and void"; the respondent recognizes (although he seeks to distinguish) the authority of *Birch* v. *Anthony*, 109 Ga. 349, wherein the court condemned not only "any agreement conditioned on the obtainment of a divorce," but any agreement "intended or calculated to facilitate its obtainment"; and the unenforceability of the executory portions of such an agreement is equally plainly provided in Georgia law (petition,

[6] *Ruhlin* v. *New York L. Ins. Co., supra,* 304 U. S. at p. 209.

[7] *Huddleston* v. *Dwyer, supra,* 322 U. S., at p. 236.

p. 29, footnote 33). Surely, if on this decisive point of the case the Circuit Court of Appeals was looking to Georgia law, something would have appeared in the opinion—and the parties and this Court were entitled to have something appear in the opinion[8]—to show that it was under Georgia authority that the Circuit Court of Appeals reached the conclusion either that the agreement was good in its inception, or that it was made good by the conduct of the parties, or both. In point of fact, the Circuit Court of Appeals avoided holding on either of these points, and thereby avoided reference to Georgia law entirely. This is plain from the sentence which we have quoted above, wherein the Circuit Court of Appeals refers to the record, but not to the authorities, and makes no mention of the agreement as such, but limits itself to the conclusory statement that the wife "had a substantial claim against the estate which is valid and unpaid."

For the rest, the Response herein is built around the proposition, which we have already conceded in the petition, that the agreement between the husband and wife did not provide in so many words for an uncontested divorce proceeding. However, the situation of the parties, their negotiations, the nature of the agreement between them, and their conduct before and immediately after making the agreement, none of which is denied in the Response, make it clear that arranging for an uncontested divorce was exactly what the parties intended, and what they did. We press this point, because the factual realities make it so emphatically clear that in No. 324, as in Nos. 301 and 316, Georgia law was disregarded in the dispositions below.

III. Alternative Ground for Granting the Writ

The importance of maintaining strict standards of integrity in a director's dealing with his corporation does not need to be labored. We have demonstrated in our petition

[8] Cf. *Huddleston* v. *Dwyer, supra,* 322 U. S. at p. 237.

that if, contrary to all the reasonable indications, the Courts below did proceed with reference to Georgia law, then this is a case in which they have decided an important question of local law in a way probably in conflict with applicable local decisions. It is quite impossible to reconcile the results arrived at below with the Georgia statute and case law cited in our petition; and we think it would not be unfair to say, that no serious attempt at such reconciliation is made in the Responses herein.

CONCLUSION

We respectfully submit that, upon the submission already made, certiorari should be granted, the judgment of the Circuit Court of Appeals vacated, and these causes remanded for determination in conformity with the correct rule of decision;[9] or, if the Court reaches the conclusion that the courts below did decide with reference to Georgia law, then certiorari should be granted on the alternative ground, appearing in our petition and hereinbefore referred to, that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

May, 1947.

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[9] *Rosenthal* v. *New York L. Ins. Co., supra,* 304 U. S. 263.